Supreme Court, U.S.
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No.

In The

Supreme Court Of The United States

Vincent Gillespie,
Petitioner,

v.

Peggy Roggenbuck Gillespie,
Respondent

On Petition For Writ Of Certiorari
To The Massachusetts Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

Vincent Gillespie
Petitioner In Pro Per
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I) Questions presented:

1) The Probate Court granted summary judgment in favor of the executrix and against the petition to have her removed. Did the court err in granting summary judgment?

2) Is Peggy Roggenbuck Gillespie ("Peggy"), the executrix of Gregory Gillespie's estate, unsuitable for her role as executrix?

3) Does the petitioner ("Vincent") have standing to petition the court for the removal of the executrix?

1) Is the will of Gregory Gillespie ("Greg"), and/or the trust created by it, charitable in nature?

2) Did the Probate Court err in denying the motion for reconsideration of the order granting summary judgment in favor of the executrix?

3) Vincent filed a separate action in the Superior Court, a complaint against Peggy. Does the Superior Court case give Vincent standing to petition for the removal of the executrix?

4) Did the Probate Court err in refusing to provide a report of material facts regarding its denial of the motion for reconsideration of its order granting summary judgment in favor of the executrix?

5) Have Vincent's rights under the U.S. Constitution, 14th Amendment (or other parts of the Constitution) been violated by the Probate Court's refusal to provide a report of material facts and the refusal of the probate and appeals courts to acknowledge the significance of the Superior Court case?

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[1] **ABBREVIATIONS KEY:**

"M.G.L." stands for Massachusetts General Laws.

Appendices attached to this brief: Appendix C, p. 43 = "Ap.C-43."

Pleadings presented to the Mass. Court of Appeals ("MCA"): Record Appendix, volume 2, pp. 633-634 = "A2-633-634"; Record Appendix, volume 1, pp. 22-25 = "A1-22-25"; Appellant's Opening Brief, p. 5 = "MCA.Op.Br-5"; Appellee's (Peggy's) Brief, p. 7 = "MCA.Peggy.Br-7"; Appellant's Reply Brief, p. 88 = "MCA.Reply.Br-88"; Transcript Record, pp. 55-56 = "MCA.Tr-55-56"; Impounded Appendix, p. 9 = "MCA.I-9."

Application for Further Appellate Review to the Mass. Supreme Court: "MSC.FAR-16" (That would mean p. 16 of that document.)

III) Table of Authorities:

15 Am.Jur.2d. § 6	16-17
15 Am.Jur.2d. § 8, 11, 50, 118, 119, 130	17
Attorney General for the Norfolk District v. David Magraw, 417 Mass. 169 (1994).	20, 21, 23, 24
Attorney General v. Bailey, 386 Mass. 367 (1982).	30
Graham v. Quincy Food Service Employees Association and Hospital Library and Public Employees Union, 407 Mass. 601 (1990).	30
Harrison v. Boston Financial Data Services, Inc.,37 Mass. App. Ct. 133 (1994).	30
Hub Associates, Inc. v. Goode, 357 Mass. 449 (1970).	30
Kapialani Park Preservation Society v. Honolulu, 751 P.2d 1022 (1988).	11, 14
Quincy Trust Company v. Taylor, 317 Mass. 195 (1944).	21

IV) Opinions entered in this case by the lower courts:

The Probate Court's Order and Memorandum of Order On Motion For Summary Judgment, dated 6/24/04 ("Judge Wilson's Memorandum"): See Ap.A-33.[2]

The Mass. Appeals Court's Memorandum and Order, dated 8/14/06: See Ap.B-63.

V) Jurisdiction:

On 11/2/06 the Massachusetts Supreme Judicial Court denied the Petitioner's Application For Further Appellate Review. (Ap.C-71.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

VI) Laws and statutes involved in the case:

M.G.L. chapter 230 § 5 (Ap.I-98)	21
M.G.L. chapter 215 § 11 (Ap.J-99)	23, 24
M.G.L. chapter 68 § 18 (Ap.K-100)	14
Mass. Constitution, Part 1, Article XI (Ap.L-101)	25
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Mass. Rules of Civ. P., Rule 60(b) (Ap.O-104)	4
Probate Court Standing Order 2-99	4

VII) Statement of the case:

A) General Background Information:

Gregory Gillespie ("Greg") was a renowned and extraordinary artist. His estate is currently represented by the Salander-O'Reilly Gallery, a prestigious art gallery in New York City. Some of his paintings are in the Metropolitan Museum in NYC, the Hirshhorn Museum in Washington D.C., the Whitney Museum in NYC, the Museum Of Fine Arts in Boston and many other fine museums around the country. His work has been shown in numerous one man and group shows around the country and in Europe and Japan, and it has been written up in numerous publications (A1-177-

[2] See the Abbreviations Key in footnote #1 on p. iii.

181). (To see some images of his work enter "Gregory Gillespie" into the images function of Google.) Adam Weinberg, Director of the Whitney Museum,[3] and Malcolm Rogers, Director of the Museum Of Fine Arts in Boston, have provided letters (as part of an earlier motion) praising Greg's work and expressing the importance of having it on public display and available to the public for viewing (see: Ap.F-90, Ap.G-92; A2-718-724).

Greg died on April 27, 2000 by suicide at age 63. His widow is Peggy Roggenbuck Gillespie ("Peggy"). There are two children from a previous marriage of Greg's (to Frances Cohen Gillespie), Vincent Gillespie ("Vincent") and Lydia Gillespie ("Lydia") (ages 45 and 43, respectively), and there is a younger daughter, Julianna Gillespie, a.k.a. Jay ("Jay") (age about 19), who was adopted by Peggy and Greg.

When Greg died he left about 420 paintings, which comprised the great majority of his estate. Roughly 390 paintings remain in the estate at this time. Peggy is the executrix of Greg's estate, as specified by the will.

B) Background Information Regarding The Will:

The will states that an art expert should be hired to evaluate every single painting in the estate and categorize each one as either "non-major," or "major." "Major" works are defined as "...those of extraordinary quality or museum caliber quality." (Ap.E-78; A1-17) The will specified that Lydia and Vincent were to choose five non-major paintings each prior to any other distributions being made. The rest of the estate, basically, was to go into a trust, the Gregory Gillespie Revocable Trust, which had Peggy as one of the trustees. The proceeds from the sales of paintings by the trust go to Peggy and Jay and, under certain contingencies, to several specified charities. (MCA.I-54-55.)

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[3] The Whitney Museum is one of the most prestigious museums in the world for contemporary American Art. See Adam Weinberg's letter, Ap.F-90. (A2-723.)

Article Ninth of the will specified that it was *Greg's primary intention* that the paintings should be sold in a program of sales designed to *maximize the viewing audience of the paintings after their sales* (which for practical purposes means placing them in museums). (See: Ap.E-83-84; A1-24-25.) Virtually identical language is repeated in the trust. (MCA.I-63-64.)

C) Procedural History:

The will was submitted for probate on 5/24/2000 and allowed by the court on 7/13/2000.[4]

Pursuant to the will, the estate hired an art expert, Dr. Carl Belz, to categorize each painting in the estate as either "major" or "non-major." On 3/5/01, under pressure from Peggy's attorney, Vincent selected five choices for paintings but he explicitly stated that he was doing so under protest. (A1-368.)

By 2002 Vincent had become aware of substantial improprieties in Peggy's conduct and management of the estate. On 8/30/02 Vincent filed a petition for inventory and account (no inventory and accounting had been filed up to that point). (A1-33; A1-10.) In October of 2002 he finally moved from California, where he had resided (for the most part) for about 20 years, to Massachusetts, and began personally and extensively investigating these improprieties.[5]

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[4] Attorney Tom Lesser, who was representing Lydia and Vincent regarding their mother's (not Peggy) estate, filed an appearance on behalf of Vincent and Lydia regarding their father Gregory Gillespie's estate. Attorney Lesser stated in writing that Vincent and Lydia had no objection to the will. However, he later provided an affidavit acknowledging that there had been a misunderstanding and that Vincent had not authorized any such statement nor appearance. (A2-842.)

[5] Vincent did not initially object to the will because he simply did not know much about Peggy's abuse and extreme manipulation of Greg and her other misconduct. It was only after he moved to Massachusetts and began looking into it all that he learned of these things.

On 11/18/02 Vincent filed a petition in the Probate Court to have [illegible] executrix removed. (A1-34; A1-10.)

On 4/25/03 Vincent filed an action in the Superior Court, alleging *Interference With The Expectancy Of Receiving A Gift* and *Wrongful Death.* (A2-784.)

On 5/20/03 Peggy filed a Motion For Summary Judgment in the Probate Court regarding Vincent's petition to have her removed as executrix. On 6/24/04 the Probate Court granted summary judgment in Peggy's favor. (A2-752, 753.) Vincent filed a notice of appeal of this order on 7/19/04. (A2-769)

On 6/23/05 Vincent filed a motion for reconsideration[6] of the 6/24/04 order granting summary judgment. (A1-13; A2-771.)

Subsequently, on 7/1/05, Vincent filed an Amended Motion For Reconsideration of the 6/24/04 order (which complied with Standing Order 2-99; the original version did not). (A2-834.) When he later discovered that the Probate Court had already denied the original Motion For Reconsideration of the 6/24/04 order before the Amended Motion For Reconsideration of that order had been filed, he filed another (third) Motion For Reconsideration (on 7/14/05), which urged the court to reconsider its position and review the amended (second) version in place of the original (first) version. (A2-885.) The Probate Court denied this motion on 8/17/05. (A2-891.) The petitioner filed a notice of appeal of this order on 9/14/05. (A2-893)

On 8/14/05 Vincent filed a timely motion for report of material facts pertaining to the Probate Court's denial of the original Motion For Reconsideration of the 6/24/04 order. (A1-13 and A1-892.) The Probate Court denied this motion on 8/17/05. (A2-892.) The petitioner filed a notice of appeal of this order on 9/14/05. (A2-893)

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[6] It was actually a motion for relief from judgment (pursuant to Mass. Rules of Civ. P., Rule 60(b) [see Ap.O-104]) or a motion for reconsideration.

On 8/14/06 the Mass. Court of Appeals denied Vincent's appeals. (Ap.B-63.) On 11/2/06 the Mass Supreme Judicial Court denied an application for further appellate review. (Ap.C-71.)

D) Background: Issues Argued In The Lower Courts relating to the executrix's unsuitability:

1) Peggy perverted the selection process: Peggy manipulated the selection process in several ways, preventing Vincent and Lydia from being afforded a full and proper opportunity to each choose their five non-major paintings:

1.1) *She claimed 48 paintings had been given to her:* She dubiously claimed that Vincent and Lydia could not choose from among 48 of the paintings because, she asserted, Greg had given them to her prior to his death and so they were not part of the estate. Vincent provided substantial evidence showing that this claim was false.[7] (MCA.Op.Br-5-7; A1-418.) Peggy's only response in her appellee's brief was to merely state (without support) that Vincent's allegations were without substance and that there was "inherent difficulty" in proving that the gifts were in fact made. MCA.Peggy.Br-11.

1.2) *Peggy manipulated the art expert, Dr. Carl Belz:*

1.2(A) *She covertly resubmitted paintings to Dr. Belz:* After Dr. Belz had made his initial determinations of which paintings were major and which were non-major and had submitted his lists of his determinations to Peggy's attorney, she covertly contacted Dr. Belz on at least two occasions and resubmitted a number of paintings to him, encouraging him to reconsider his categorizations for these paintings. This resulted in him recategorizing 14 paintings from "non-major" (available for Vincent and Lydia to choose from) to "major" (not available for Vincent and Lydia to

[7] This evidence included, inter alia, notes created by Peggy which strongly implied that she was merely claiming paintings she wanted as hers, rather than that Greg really gave them to her.

choose from) and one from "major" to "non-major." Thus Peggy manipulated the process to her advantage by removing some of the better non-major paintings from the pool of non-major paintings available for Vincent and Lydia to choose from.[8]

1.2(B) *She misled Dr. Belz:* Peggy misled Dr. Belz about the future disposition of the paintings in the major category. Peggy repeatedly told Dr. Belz that his determinations of which paintings were major and which were non-major would define Greg's legacy (implying that the "major" paintings would be destined for museums or other modes of public display instead of being sold to private collectors). In his deposition Dr. Belz admitted that this caused him to "err" on the side of placing more paintings into the major category (not available for Vincent and Lydia to choose from) rather than the non-major category (available for Vincent and Lydia to choose from). (Also, Peggy did not explain to Dr. Belz that placing better paintings into the major category financially benefited her.) Subsequently, Peggy completely ignored the major/non-major categories created by Dr. Belz and made no special efforts to place the paintings into museums. *She now insists that she has no obligation to place paintings in museums.* (MCA.Peggy.Br-22.) Thus she tricked Dr. Belz into placing as many paintings as possible into the major category (so that Vincent and Lydia could not choose from among them) by telling him that these paintings would be going to museums and then she made no effort to place them into museums.[9]

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[8] Paintings not chosen by Vincent and Lydia get sold by the trust with the proceeds going to Peggy. Thus it benefits her to prevent Vincent and Lydia from choosing the more valuable non-major paintings.

[9] Both the Probate Court and the Appeals Court cited Dr. Belz's "undisputed testimony," indicating that he did not think Peggy had manipulated him, as evidence that she hadn't done so. (Ap.A-51; Ap.B-67.) However, he only said this because he didn't understand that Peggy was not going to place the major paintings into museums (contrary to what she had told him). His testimony clearly implies that if he had

2) The National Academy Museum: Peggy *falsely* indicated to the court that she had arranged to donate a painting to the National Academy Museum. (MCA.Op.Br-15-16.) This allegation is *undisputed.*

3) Peggy grossly undervalued the estate: Peggy initially (prior to the start of the litigation) grossly undervalued the estate in court filings (assigning it a value which was less than $1/10^{th}$ of its actual value), apparently in an effort to avoid drawing the attention of Vincent and Lydia. (MCA.Op.Br-p. 15.) This allegation is *undisputed.*

4) Peggy was caught red-handed, lying to the Superior Court. She falsely claimed that she did not have the prior wills and prenuptial agreements (these were some of the items which the court had ordered her to produce) in her possession and that she therefore could not produce them. This allegation is *undisputed.* (MCA.Op.Br-25.)

5) Peggy tried to manipulate Lydia into trading the "Waterfall" painting (one of her choices of five non-major paintings) in exchange for a less valuable painting (MCA.Reply.Br-17).

6) Peggy refused to place paintings in museums: Peggy ignored the terms of the will requiring paintings to go to museums and she just sold them to private collectors instead (MCA.Op.Br-10-13, 9-10).

7) Peggy tried to stiff the Forum Gallery regarding a large debt which she owed: Peggy unethically tried to evade an obviously legitimate debt of $260,000 to Greg's dealer, the Forum Gallery, which had represented him for over 30 years. Her conduct towards the gallery was insidious and unethical and it resulted in unnecessary litigation, after which the parties settled and she was forced to pay the debt anyway.[10] (MCA.Op.Br-pp. 13-15.)

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known this he would have made different categorizations for some of the paintings and this shows that he had, in fact, been manipulated.

[10] See the comments from the judge in the Forum Gallery vs. Peggy Gillespie, et al. lawsuit. (Ap.H-95.)

8) Peggy unethically tried to evade the petition to have her removed as executrix by asking for and receiving an extension regarding the date for her to submit her accounting by (Vincent opposed granting this extension of time) and then using that time to transfer the paintings to the trust (prior to her filing the accounting) and then dubiously claiming that the petition to remove her as executrix of the estate was moot since the paintings were in the trust and no longer in the estate. (MCA.Reply.Br-4.) (A1-398. See also A1-189.)

VIII) DISCUSSION:

A) Does Vincent have standing on behalf of the public interest?

Both lower courts ruled that Vincent doesn't have standing to seek the removal of the executrix as an individual acting on his own behalf, and that there was insufficient evidence of misconduct on the part of the executrix to warrant the court acting sua sponte to remove her. (These issues have been covered to some extent in the previous section titled "Background: Issues Argued In The Lower Courts Relating To The Executrix's Unsuitability.")

The lower courts also ruled that Vincent does not have standing to act on behalf of the public interest to seek the removal of the executrix. (This issue was discussed in the lower courts in many places including: A2-700, MCA.Op.Br-38 and MSC.FAR-10-14.) Here we will discuss this issue:

As discussed above, Greg was a highly renowned and prominent artist. It is in the public interest that his work be placed in museums so that it will be available for public viewing, consistent with the directives in his will. (See the "General Background Information" section, pp. 1-2. See also the letters from museum directors, Ap.F-90 and Ap.G-92.)

Greg's will states that it was his *primary intention* that his paintings should be sold in such a way that the viewing audience of the paintings will be maximized after their sales. The will, article Ninth (Ap.E-83-84), states the following:

"The program of sales shall be in accordance with the following guidelines:

"A. It is my primary intention that my works of art be sold to institutions or individuals that will permit the widest possible audience to view my works after their sale. Accordingly, my executrix shall endeavor to sell my works of art to museums, universities and other charitable organizations that will be able to place my works of art on public display. My executrix may also make sales to private collections, and, in her discretion, my executrix may require certain commitments of public display as part of the negotiations for the sale of any of my works of art.

"B. It is also my intention that the sale of my works of art shall be made on a timely basis in the light of public acceptance of, appreciation of, and demand for my works of art so as to maximize the sales price for each work of art sold. I understand that demand for my works of art may fluctuate, and, accordingly, I request that my executrix participate with the aforementioned Trustees to establish a flexible program of sales, recognizing that there may be a need to spread sales over a considerable period of time."

The above quotation from the will is duplicated in the trust, underscoring its importance. The meaning of these few sentences has been the subject of intense disagreement and dispute by the parties in this case and even the two lower courts disagreed with each other to a significant extent on the intended meaning. (Ap.A-55; Ap.B-68.)

Unfortunately, Peggy believes and insists that these words put *no obligation on her whatsoever* to place paintings in museums, and she has acted accordingly. (MCA.Peggy.Br-22.) She didn't even bother to inform the dealers who had shows of Greg's work about the terms of the will (requiring

paintings to be sold so that they will be placed on public display). (She has admitted this fact.) During her 6 ½ year tenure as executrix only two small paintings have gone to museums.[11] (A1-421. MCA.Op.Br-11.)

It should be understood that Peggy has a direct conflict of interest here. Proceeds from the sales of the paintings go to Peggy. However, placing paintings in museums, even for a renowned artist, often requires substantially reducing prices or even donating the paintings. Thus for Peggy to place paintings into museums requires her to sacrifice some of her profits by selling paintings for less money. So Peggy is really the wrong person to have as executrix of the estate, since her financial interests run counter to the primary intention of the testator.[12] (MCA.Op.Br-12, 29; A1-427-428.)

Thus Vincent has argued in various pleadings that he has standing to act in the public interest. The public interest issue here is whether or not about 390 paintings by a highly renowned artist, Gregory Gillespie, will be sold in such a way that they will be available for the public to view them (i.e., placed in museums), or whether they will be sold to private collectors, where the public will have much less of a chance of ever seeing them. Peggy claims that she has no

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[11] Even those two museum sales appear to have occurred simply through the normal course of events rather than through any special effort by Peggy to place paintings in museums.

[12] Note that the fact that Greg didn't foresee that Peggy would just try to get as much money as possible, disregarding the terms of the will covering his wishes about placing paintings in museums, is consistent with her treatment of him during his life. She abused, manipulated and extorted from him in many ways throughout their relationship, including pressuring him into creating a will which gave almost all the assets to her. These allegations are contained in the pending Superior Court action (A2-845). Greg had a unique, unbalanced and insecure personality which was fanatically and obsessively focused on his art. This left him very weak in certain ways and vulnerable to manipulation by Peggy. Peggy's refusal to put paintings in museums while profiting from the will is a continuation of the way in which she exploited Greg prior to his death. Understanding this will help the reader make sense of the entire picture.

obligation to place the paintings in museums and she is clearly intent on proceeding on a course in which she does not place them into museums. This will maximize her profits but it will harm the public interest and thwart Greg's primary intention. Peggy has a complete conflict of interest.

Vincent cited Kapialani Park Preservation Society vs. Honolulu (751 P.2d 1022 (1988)) in the Probate Court.[13] In that case there was a charitable trust with the public as a beneficiary. Kapialani Park was a free public park to be maintained by the trustee, the City of Honolulu. The city sought to lease out a portion of the park to a company which sought to establish a restaurant on it but other parties claimed that this was in violation of the terms of the trust. The Attorney General sided with the city. The HI Supreme court ruled that under those circumstances "...members of the public, as beneficiaries of the trust, have standing to bring the matter to the attention of the court." Otherwise, that court wrote, the trustee could do as it pleased with the trust, with the concurrence of the Attorney General, "...without the citizens of the City and State having any recourse to the courts. Such a result is contrary to all principles of equity and shocking to the conscience of the court." (Kapialani at 1025.)

In the instant case the Massachusetts Attorney General's Office declined to become involved (A2-740, 704). Judge Wilson's Memorandum acknowledges that if the will was charitable then the Kapialani case would apply to the instant case. (Ap.A-56.) He also claimed, however, that the will was *not* charitable (implying that the Kapialani case did not apply). And this has been a central and key question throughout these proceedings: Is the will charitable?

Judge Wilson cited several fallacious premises to support his conclusion that the will is not charitable:

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[13] The fact that Vincent cited an out of state case for a Massachusetts court is not blameworthy here because judge Wilson of the Probate Court explicitly invited out of state case law (MCA.Tr-55).

First he asserted that the executrix has the ultimate discretion of whether or not to sell any art work at all. (Ap.A-54.) (The appeals court also cited this point. [Ap.B-68.]) Although the will does say this, this actually doesn't mean all that much. Greg knew that Peggy would have no interest in keeping 420 paintings for a long time. He also knew that she had an incentive to sell them so that she could get the money from the sales. So he knew that most or all of the paintings were probably going to be sold.

Also, many of his paintings had been hanging around unsold for many years (that's why there were about 420 paintings in the estate when he died) and Greg was used to waiting for considerable periods of time before paintings sold. Thus, this clause reflects that Greg was not in a rush to get the paintings into museums, as long as they eventually ended up there, and if they were held for some time prior to their sales this was fine.[14]

The Probate Court also claimed, in arguing that the will was not charitable that "...although the decedent's intent is for the widest possible audience for his artwork, the executrix has complete discretion whether to require commitments of public display for the sale of any artwork..." (Ap.A-54-55.) The Appeals court also understood this point in this way. (Ap.B-68.) *This is a huge, fundamental misunderstanding and misreading of an utterly key point in the will, engaged in by both lower courts.*[15] Let us carefully analyze this point in the will so that we can see what it actually is saying:

Greg wanted his paintings sold in a way that would put them on public display as much as possible. However, accomplishing this can be difficult, even for a prominent

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[14] This clause is also consistent with the phrase in Article Ninth of the will that says: "...there may be a need to spread sales over a considerable period of time."

[15] Whenever this brief refers to "both lower courts" it is referring to the Hampshire Probate Court and the Mass. Court of Appeals. It is not referring to the Hampshire Superior Court, despite the fact that a related action is pending there.

artist. Greg knew this. Thus, after stating that the viewing audience of the paintings should be maximized he directed the executrix to pursue four avenues which could help accomplish this goal. (Please refer to the quotation above [p. 9] from article Ninth in the will as necessary.) The sentence immediately following the sentence about maximizing the viewing audience contains the first three of these avenues. It says: "Accordingly, my executrix ***shall*** endeavor to sell my works of art to [1] museums, [2] universities and [3] other charitable organizations that will be able to place my works of art on public display." (Emphasis and numbers in square brackets have been added.) Those are the first three avenues for getting paintings on public display and there is *no wording about the executrix having discretion with regard to these three avenues*. The phrase "shall endeavor" is used. "Shall" is *not* a discretionary term.

In the next sentence the will explains a fourth avenue for getting paintings on public display. He writes: "My executrix may also make sales to private collections, and, in her discretion, [4] my executrix may require certain commitments of public display as part of the negotiations for the sale of any of my works of art." (Number in square brackets added.) This fourth avenue contains a discretionary term ("...in her discretion...") and *that discretionary term applies only to this fourth avenue*. It does *not* apply to the first three avenues for getting paintings on public display.

So both lower courts completely misunderstood the will (and the trust which contains the same language) on whether or not the executrix is given discretion on whether or not to sell to museums (or universities or other charitable organizations which will put the paintings on public display). The will actually does not give the executrix much discretion on this point.

It is very significant that both lower courts misread this key phrase in the will as saying that the entire issue of placing paintings on public display is discretionary. As discussed above, this is a very incorrect reading of the will.

The Probate Court cited another reason as well for concluding that the will was not charitable. It asserted that article Ninth also states that Greg wanted his prices maximized. Thus, judge Wilson reasoned, the only reason why Greg wanted his paintings in museums was to maximize prices to get more money for Peggy and Jay and thus the two concepts, maximizing prices and maximizing the viewing exposure of the paintings after their sales, both served the same single purpose of getting more money for Peggy and Jay.[16] Thus, judge Wilson concluded, there was no charitable intent at all in the will (and so the Kapialani case did not apply). (Ap.A-55.)

This reasoning is flat out false and as part of the motion for reconsideration Vincent produced several affidavits from relatives who affirmed that Greg's primary aim was getting paintings into museums so they would be widely viewed and appreciated and that the reason why he wanted to maximize the prices was to maintain the *prestige* of the paintings, which is consistent with having his paintings widely viewed, appreciated and respected by the public (A2-852-855). Thus maximizing prices and maximizing the viewing audience both serve the purpose of having his paintings widely viewed and appreciated by the public. The Probate Court responded to this evidence presented in the motion for reconsideration by denying the motion without comment and then refusing to provide a report of material facts on why it did so.[17]

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[16] Although prices often need to be reduced to get paintings into museums, it can also be argued that in the long run placing paintings in museums increases prices. This is because it increases their prestige and over time this increases the prices of the artist's work.

[17] The Probate Court also appeared to indicate that for there to be a charitable purpose there needed to a gift (i.e., it should be given "for free"). (Ap.A-53; also: MCA.Peggy.Br-20.) This is incorrect. See MGL 68 § 18 (Ap.K-100). There is no requirement that something be given "for free." Selling paintings to museums is "welfare related" and it "benefit[s] the general public or some indefinite class thereof" so it is a charitable endeavor, in accordance with M.G.L 68 §18. (MCA.Reply.Br-14.)

The appeals court, after reading the appellate briefs which discussed these affidavits, seemed to disagree with judge Wilson's reasoning by implying that the language in the will about maximizing the viewing audience, Greg's primary intention, *was charitable*. However, they also asserted, in so many words, that this charitable intent was outweighed by the rest of the will, which, they said, was primarily to benefit Peggy and Jay. (They wrote: "Although there is language in the decedent's will indicating that he sought the widest possible audience for his work, the will as a whole is clearly designed to benefit Peggy and Julianna." Ap.B-68.)

The appeals court then went on to give four reasons to explain why it concluded that the will as a whole was not charitable and that it was designed to benefit Peggy and Jay:

(1) They state that the executrix has discretion as to whether to sell any artwork at all. (Ap.B-68.) The implications of this are ambiguous, as discussed above.

(2) They state that "...the executrix has discretion to require commitments of public display as part of the sale of any artwork." (Ap.B-68.) They misunderstood this key point, as discussed above.

(3) They write that "[t]he decedent indicates that sales of artwork should be timed to take maximum advantage of demand." (Ap.B-68.) This sentence is apparently for the purpose of maximizing sales prices and thus maintaining the *prestige* of the paintings, which is consistent with Greg's overall objective of having his paintings viewed, appreciated and respected by as wide an audience as possible. These issues are addressed in the affidavits included in the motion for reconsideration and they are discussed below (pp. 18-19).

(4) The appeals court also asserts the fact that the paintings got moved to the trust which has Peggy and Jay as beneficiaries as a reason why they conclude that the primary intent of the will was to benefit Peggy and Jay and not the general public. (Ap.B-68.) They apparently missed the fact that the trust contains virtually identical language as that contained in article Ninth of the will about Greg's primary

intention being to maximize the viewing audience of the paintings after their sales. That is a very important misunderstanding on the part of the Appeals court.

Thus the appeals court's reasoning for concluding that the primary intent of the will was not charitable, not to benefit the public, but rather to benefit Peggy and Jay, does not stand up to scrutiny.

Also, in determining that the will was not charitable both lower courts also ignored the following evidence:

- The fact that the provision regarding a desire to maximize the viewing audience of the paintings is preceded by the declaration that it was Greg's primary intention.
- The fact that Peggy admitted that it was Greg's lifelong objective to have his paintings in museums. (A1-233-234 [Par. 12]; MCA.Reply.Br-17.)
- Under certain conditions (if Greg and Peggy and Jay die before Jay reaches the age of 25 and Jay has no surviving children), the will gave gifts to specifically named charities, e.g., $20,000 to Amnesty International. (MCA.I-54-55.)
- Greg required that an art expert be hired to evaluate every single painting in the estate and categorize it as either "major" or "non-major," with "major" being defined as "extraordinary quality or museum caliber quality". This implies that he wanted the "major" paintings to be placed on public display, in museums.
- They also assumed that Greg expressed himself in such a nonsensical way that he stated his primary intention of placing paintings in museums and then added so many discretionary terms that his primary intention could be completely negated and ignored. This doesn't make sense.

Additionally, in coming to the conclusion that the will is not charitable, both lower courts ignored the following points from American Jurisprudence:

(1) "...an intermixture of selfish interest or benefit in an otherwise charitable trust will not ordinarily defeat its

charitable classification, at least not entirely." (15 Am.Jur.2d. §6.)

(2) "Words of recommendation, request, entreaty, wish, or expectation will impose a **binding duty** upon the donee or devisee by way of trust..." (15 Am.Jur.2d. §8.)

(3) *"A trust for the support of an art or other public museum is also a valid charitable use..."* (15 Am.Jur.2d §50.)

(4) "Every intendment favors charities and gifts for charitable purposes, and it is not only a policy of the people, but likewise a legislative policy, to deal broadly and sympathetically with charity." (15 Am.Jur.2d §11.)

(5) *"Gifts or trusts for charitable purposes are favorites of the law and the courts*. It is the fixed policy of the law to uphold charitable gifts and trusts whenever possible....**Courts of equity, it is said, will go to the length of their judicial power to sustain such gifts."** (15 Am.Jur.2d § 118.)[18]

(6) "**...it is the rule that where doubt exists, a gift must be interpreted in favor of a charity.** Where they cannot be followed literally, the courts usually apply the cy pres or a similar doctrine." (15 Am.Jur.2d § 118.)[19]

(7) "While the intention of the testator or donor is the touchstone ... **that intention, if a charitable one, will be effectuated by the most liberal rules of construction that the law will permit.** Charitable gifts are construed liberally and upheld if reasonably susceptible of a construction which gives them validity." (15 Am.Jur.2d § 119.)

(8) *"A court of equity has jurisdiction to fill vacancies, break stalemates, and inject itself where there is a threat to prevent the accomplishment of the objectives of a charitable trust*." (15 Am.Jur.2d § 130.)

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[18] This is an extremely potent section of American Jurisprudence regarding charitable trusts and it is right on point here. The reader is urged to review the entire section at Ap.N-103.

[19] Ibid.

(All emphases in the above quotes are added.) (Similar points as the above 8 points were raised with the lower courts at: MCA.Op.Br-34-38; A2-702-705; MSC.FAR-11, 13-14.)

These are very strong words. The above citations provide ample basis to find that the will is charitable and that Vincent has standing to petition for Peggy's removal. These citations also show that courts should be doing all they can to support a charitable interpretation of the will and the implementation of that charitable purpose. However, in this case the lower courts seem to be doing the opposite, they seem to be trying to thwart a charitable interpretation and purpose. The Mass. Appeals Court has *implicitly acknowledged that Greg's primary intention is charitable* and yet they still interpret the will itself as non-charitable. (See p. 15, above; Ap.B-68.) That is surely not in keeping with the above principles.

From another perspective, one can play around with words and definitions regarding this topic all day long (as has been done in the lower court pleadings) but one only needs to look simply and straightforwardly at this issue to see that there is a real public interest at stake here. Whether or not hundreds of paintings by a highly renowned artist will be available for the public to view them is at stake. This is an issue of significance to the general public. Great art can inspire and bring insight or joy to the viewing public. It can also provide guidance to aspiring artists, accomplished artists and to art scholars as well. The Supreme Court's intervention is needed here so that society will not loose the benefit of having this excellent art available to the public.

B) The Motion For Reconsideration of the Order Granting Summary Judgment:

B)(1) The three affidavits about Greg's intentions:

The motion for reconsideration of the order granting summary judgment included three affidavits from Vincent, Lydia and Alice Bonavita (Greg's sister), which addressed

the issue of Greg's overall objective in maximizing the viewing audience of his paintings after their sales:

Judge Wilson's Memorandum incorrectly reasons that Vincent did not have standing on behalf of the public because the estate was not charitable in nature because Greg wanted to maximize the viewing audience of his paintings only for the (non-charitable) purpose of getting more money for Peggy and Jay, and not because of a (charitable) intention and desire to have his works widely viewed and appreciated by the public. (Ap.A-55.) That court also cited the clause in the will about maximizing sales prices (saying that this also showed a non-charitable intention). (Ap.A-55.)

The three affidavits in the motion for reconsideration explicitly refuted these ideas. (A2-852-855.) The affidavits explained that Greg wanted his paintings in museums so that they would be widely viewed and appreciated by the public, and not for the purpose of getting more money for Peggy and Jay. The affidavits also explain that the reason why Greg's will discusses maximizing sales prices was to maintain the *prestige* of the paintings and that, consistent with this, his overriding and strongly held objective was to have his works as widely viewed and appreciated as possible by the public.[20]

B)(2) The Superior Court action:

The Motion for reconsideration also included a discussion about the Superior Court action and how that gives Vincent standing to pursue the petition in the Probate Court seeking the executrix's removal. (This issue was raised in the lower courts: A2-835-839; MCA.Op.Br-23-25, 44, 46-47; MSC.FAR-15-17.)

Vincent filed an action in the Hampshire County Superior Court on 4/25/03. The causes of action were *Interfering With The Expectancy Of Receiving A Gift* (i.e., undue influence regarding the will) and *Wrongful Death*. Peggy, as the executrix of the estate, has control of many documents

[20] These affidavits must be assumed to be truthful. See p. 30, fn 30.

pertaining to Greg and the estate and she is responsible for responding to discovery requests for such documents. Her reaction to the Superior Court action has been a pattern of stonewalling and obfuscation and she has so far refused to provided any significant discovery evidence at all and she has filed frivolous motions. (MCA.Op.Br-23-25.) She has also refused to waive Greg's attorney-client and psychiatrist-patient privileges (which pass to her as executrix of the estate), creating another obstacle to providing discovery.[21]

This situation is strikingly similar to the case of District Attorney for the Norfolk District vs. David Magraw (1994), 417 Mass. 169. In that case David Magraw was the executor of his deceased wife's estate. He was also a suspect in her death. His wife's will named him as executor. As the DA investigated the case they sought to speak to her attorney and psychiatrist to find out about the nature of her relationship to her husband. He refused to waive her attorney-client and psychotherapist-patient privileges, preventing her therapist and attorney from testifying at a grand jury hearing. The Probate Court denied a motion by the DA to remove Mr. Magraw as executor but the appellate court disagreed and ordered him removed. The Mass. Supreme Court affirmed the Appeals Court's decision. They wrote:

> "[The facts of the case] illustrate an obvious conflict of interest. The defendant, as a suspect in his wife's death, has an interest in keeping from authorities any information which has the possibility of inculpating him. This interest certainly "creates reasonable doubt" that he honestly, fairly, and dispassionately could execute his responsibilities as executor of his wife's estate."
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> (Norfolk at 174-175.)

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[21] A recent order dated 12/13/06 from the Superior Court required her to waive Greg's psychotherapist-client privilege enough to facilitate discovery.

The facts of the Superior Court case against Peggy are very similar to those in the Norfolk case. Peggy has an interest in keeping from the plaintiff any evidence which could inculpate her in the *Wrongful Death* claim or in the claim of *Interfering With The Expectancy Of Receiving A Gift*. She should be removed for essentially the same reasons that David Magraw was removed as executor.

But, the reader may wonder, will Peggy's conduct as executrix really be compromised by the conflict of interest described in the Norfolk case? Answer: aside from the facts that she has stonewalled and refused to provide meaningful discovery for years in the Superior Court case and that she refused to waive Greg's attorney-client and psychotherapist-patient privileges which has thwarted discovery, *she was also caught red-handed, brazenly lying to the Superior Court about what evidence she had.* She responded to an order from the Superior Court requiring her to produce discovery, in part, by claiming that she did not have Greg's prior wills and prenuptial agreements in her possession and so she couldn't produce them. These documents constituted important evidence which probably would help show that she caused undue influence on Greg regarding his will. Vincent responded by providing the court with proof that she was lying, a letter from her attorney admitting that these documents were in his possession. *Peggy has never attempted to refute this evidence so this allegation has been conceded.*

As in the Norfolk case, the Court in this case should act sua sponte to remove the executrix. (Norfolk at 174.) Quincy Trust Company v. Taylor, (1944) 317 Mass. 195, 196-197.

Also, as the plaintiff in the Superior Court case Vincent clearly has standing to pursue a petition for Peggy's removal.

Additionally, M.G.L. 230 §5 holds that an heir or legatee can bring an action to enforce a claim on behalf of an estate without removing the executor when the executor refuses or is unable to bring such action at the request of the heir or legatee. (Ap.I-98.) This gives Vincent standing to pursue the

removal of the executrix in the Probate Court on behalf of the estate as a matter of law.[22] (MCA.Op.Br-44; A2-845.)

So there are several ways in which the Superior Court action gives Vincent standing to pursue the petition for removal of the executrix in the Probate Court. The Superior Court action definitely gives Vincent standing.

The motion for reconsideration of the order granting summary judgment included, inter alia, discussion of both of the above topics: the affidavits addressing Greg's objective in seeking to maximize the viewing audience of his paintings after their sales, and the implications of the Superior Court action on Vincent's standing.[23]

What was the response of the Probate Court to all this evidence in the motion for reconsideration? That court denied the motion without comment. This was difficult to fathom.

Similarly, the appeals court essentially refused to discuss the contents of the motion for reconsideration. It merely said, in essence, that the review standard was an abuse of discretion standard, that Vincent did not present sufficient new evidence to warrant granting the motion for relief from judgment, and that judge Wilson did not abuse his

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[22] In the Superior Court case Vincent is named as a plaintiff acting as an individual and on behalf of the estate. (A2-844.)

[23] The Motion For Reconsideration of the order granting summary judgment also addressed other topics, including:

(1) Judge Wilson erroneously implied that the Mass. Attorney General's Office declined to get involved in the case because they had determined that the will was not charitable. (Ap.A-54.) The motion for reconsideration presented evidence (an email from the Attorney General's Office) showing this to be incorrect. (A2-744; MCA.Op.Br-22 [fn 16].)

(2) Judge Wilson wrongly stated that Vincent was represented by counsel when the will was submitted for probate and that his counsel wrote that Vincent had no objection to that petition. (Ap.A-36, 46.) The motion for reconsideration included an affidavit from attorney Tom Lesser, showing that this is incorrect. (See fn. 4 on p. 3, above.) (A2-813; MCA.Op.Br-25-26.)

discretion.[24] (Ap.B-69-70.) How can the great similarity of the Norfolk case to the Superior Court case not show that Peggy should be removed? How can the *undisputed* fact that Peggy was caught brazenly lying to the Superior Court about crucial evidence not be important enough evidence?

Vincent will obviously have great difficulty in proceeding with the Superior Court case and collecting evidence with Peggy as the executrix. How could both lower courts just ignore this evidence? Have they thrown the rule of law out the window?

C) The Probate Court's failure to provide a report of material facts:

As discussed above, the Probate Court denied without comment the motion for reconsideration. (A2-891) Subsequently, seeing the Probate Court's total silence on the issues in the motion for reconsideration, Vincent filed a motion for report of material facts, pursuant to M.G.L. 215 §11. (Ap.J-99.) (This issue was raised in the lower courts at: MCA.Op.Br-30-31, 42; MSC.FAR-16.) The motion was filed in a timely and proper manner and there is no allegation

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[24] The appeals court also implied that the evidence in the motion for reconsideration was previously discoverable. (Ap.B-69.) This is incorrect:

The three affidavits about Greg's intentions were obtained in response to Judge Wilson's Memorandum, which wrongly asserted that Greg wanted paintings in museums just to increase prices (Ap.A-55). Vincent couldn't have known ahead of time that Judge Wilson would use such dubious reasoning.

Most of the information about Peggy thwarting discovery in the Superior Court action occurred only after judge Wilson's order granting summary judgment, including most of the extensive pattern of stonewalling and obfuscation, her refusal to waive the attorney-client and psychotherapist-patient privileges (just like David MacGraw in the Norfolk case), and her getting caught lying to the court about the prior wills and prenuptial agreements. Thus, while the existence of the Superior Court action was known to the Probate Court prior to Judge Wilson's Memorandum, the pattern of obfuscation and clear evidence of misconduct in that case was not known. This was new evidence.

So there was no lack of due diligence in finding new evidence.

by any judge or party to the contrary. Judge Wilson denied this motion. His only justification was a handwritten note which said: "See Memorandum of Decision on Motion For Summary Judgment, Dated June 24, 2004, which continues to express the Court's position." (A2-892.) This comment is frivolous and nonsensical because *that Memorandum does not even mention any of the main points raised in the Motion for Reconsideration.*[25]

Furthermore, note that the law does not give judge Wilson discretion on whether or not to grant a motion for report of material facts. The law, M.G.L. c. 215 § 11 (see Ap.J-99), *requires* him to produce a report of material facts in this case. Such a report may be very important to an appeal. For judge Wilson to refuse to provide the report of material facts is a blatant violation of law and, simultaneously, an act which wrongly and unfairly *sabotages Vincent's appeal*. This very Petition For Writ Of Certiorari which the reader is now reading has probably been significantly compromised because judge Wilson refused to provide a report of material facts explaining why he denied the motion for reconsideration. Likewise, the appeal to the Mass. Court of Appeal and the Application For Further Appellate Review to the Mass. Supreme Judicial Court have both probably been significantly *compromised and sabotaged.* If we don't know judge Wilson's reasoning for denying the motion for reconsideration, how can we properly discuss it in the Appellate Briefs?

Furthermore, to allow this lower court ruling to stand is to allow a precedent which says, effectively, that any judge who is biased against a party has license to rule against them without legal basis and then to thwart their right to appeal

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[25] Judge Wilson's Memorandum does discuss the Norfolk case, but only in the context of the Probate Court case. (Ap.A-57-60.) In the motion for reconsideration Vincent cited this case specifically in the context of the Superior Court case. (A2-838; MCA.Op.Br-45, 46-47; see also A2-696-697.) Judge Wilson's Memorandum doesn't even mention the Superior Court case.

that decision by refusing to provide a report of material facts. *Note also that this precedent could interfere with the power of the US Supreme Court to properly review lower court decisions.* Allowing this precedent to stand gives license to lower courts to thwart appeals, including appeals to the US Supreme Court, by refusing to provide reports of material facts.

Judge Wilson's refusal to provide a report of material facts is totally unfair. What is the point of preparing pleadings according to law and of paying very large sums of money to attorneys if the courts will receive the pleadings and then simply act with total disregard for the law when they feel like it? What is one supposed to think of the courts when one provides clear-cut evidence of one's standing and the courts simply ignore it – pretend that they didn't read it – and then when one asks them for an explanation (the report of material facts) they simply refuse to provide it, despite the fact that the law requires them to provide it?

The petitioner is being denied his right to a proper appeal from the Probate Court order granting summary judgment, he is being denied his right to act through the courts to protect his father's legacy (by making sure his father's paintings are placed in museums, as he directed in his will), and he is being denied his right to properly pursue a civil action relating to his father's estate in the Superior Court, all on account of blatantly illegal action by judge Wilson.

Judge Wilson's refusal to provide a report of material facts is flat out illegal and it has violated the petitioner's rights to full and proper access to the courts under the Mass. Constitution and under the US Constitution (MSC.FAR-8):

The Massachusetts Constitution, Part One, Article XI guarantees citizens' rights to proper access to the courts. (See Ap.L-101.) This statute is being violated by the lower courts because the petitioner is being denied his proper right to appeal in the Probate Court case and he is also being denied the right to properly obtain discovery in the Superior Court case (Peggy has refused to produce discovery and the lower

courts' conduct is wrongly thwarting a petition to remove her) so that he can pursue that case.

Judge Wilson's illegal refusal to provide a report of material facts and the Mass. Appeals Court's refusal to address this and both lower courts' refusals to even discuss the evidence pertaining to the Superior Court case violate and negate Vincent's rights under the Mass. Constitution to have a fair and reasonable chance to find justice in the courts.

Also, the petitioner's rights under the US Constitution are being violated. The 14th Amendment states: "No State shall ... deprive any person of life, liberty, or property, without due process of law; *nor deny to any person within its jurisidiction the equal protection of the laws."* (Ap.M-102.) If the courts are violating the petitioner's state rights to access to the courts then this is also a violation of his right to equal protection of the laws guaranteed by the 14th Amendment of the US Constitution. (MSC.FAR-8.)

D) Misunderstandings And Bias In The Lower Courts:

Vincent contends that the Probate Court was biased against him and held quite a few significant misunderstandings about this case. The Appeals Court seems to have adopted some of Judge Wilson's misunderstandings after reading them in his 16 page memorandum explaining his decision to grant summary judgment. This section discusses these misunderstandings and this bias. The reasons for including this section are: (1) it helps explain why the lower courts took some very conspicuous positions (such as both lower court's refusals to acknowledge the obvious significance of the Superior Court case), and (2) Vincent is concerned that if these misunderstandings are not clarified this court might adopt some of them, just as the appeals court adopted some of the misunderstandings of the Probate Court.

What were the misunderstandings? In addition to those discussed or mentioned above there are several others:

One misunderstanding (or bias) relates to the petitioner's motives. Peggy has argued ad nauseam, in almost every

hearing and pleading of hers, that the petitioner's only motive is animosity towards her and dissatisfaction with his take under the will and that therefore the entire case (in both the Superior and Probate Courts) is without merit. Apparently, her attorney convinced the Probate Court of this.[26]

However, this is simply not correct. Vincent was appalled when he learned that Peggy had been refusing to place Greg's paintings in museums, in violation of Greg's wishes. Furthermore, her manipulation of Dr. Belz and the process by which Vincent and Lydia were to select their paintings, as well as many other acts of misconduct by her, were unacceptable. Regarding the Superior Court case, Vincent has significant evidence showing that Peggy manipulated, abused and subjugated Greg in their relationship, including creating undue influence regarding the will and including abuse which contributed to Greg's suicide. For the Probate Court and the appeals court to assume that the Superior Court case is unmeritorious (as they apparently did) is patently unfair because they have not seen any of the evidence pertaining to that case. The only court which has considered some of the evidence and issues from that case, the Superior Court itself, has issued several rulings favorable to Vincent. (MCA.Op.Br-23-25.)

Both lower courts also misunderstood another point relating to the 48 paintings which Peggy dubiously claimed were given to her by Greg prior to his death. At the 6/11/03 and 8/27/03 hearings in the Probate Court, it was agreed that Peggy would change her position and allow Dr. Belz to categorize these paintings and allow Vincent and Lydia to choose their paintings from among the non-major ones in this group (as well as the other non-major paintings in the estate). The Probate Court cited the fact that Vincent did not reselect paintings after this agreement as implying that he had

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[26] For example see Ap.A-52. ("The petitioner's real disagreement therefore appears to be with his father's decision to specifically limit his legacy under the will.")

participated in it in bad faith. ("...the petitioner's refusal to participate in this agreement cannot be used as a way to re-confer standing for him to continue to contest his legacy." Ap.A-52.) The Appeals Court also mentioned this. (Ap.B-67-68.)

However, the lower courts seem to have missed the fact that the agreement involved not only Peggy allowing Vincent and Lydia to choose from among the 48 paintings which she claimed were hers, but also it was agreed that Dr. Belz was to be deposed in order to find answers to questions about the propriety of the entire process of Dr. Belz's work in categorizing the paintings and Peggy's involvement with it.

Subsequently, according to the agreement, Dr. Belz was deposed.[27] This deposition revealed serious improprieties, as discussed above, both regarding the 14 paintings which Dr. Belz recategorized from non-major to major after Peggy resubmitted them to him[28] and also regarding the entire process and Peggy's involvement in it.[29] Thus it should not be surprising that Vincent did not seek to go ahead and reselect paintings as if nothing was wrong.

More misunderstandings and/or bias in the lower courts:

Judge Wilson wrongly implied that Vincent had provided to the Court selected excerpts of four deposition transcripts, seeking to withhold unfavorable portions of them. (Ap.A-42-43 [fn. 3-6].) This is completely incorrect because judge Wilson had previously explicitly stated that Vincent should only include pertinent portions of the transcript of Peggy's deposition (one of the transcripts in question) and not the whole thing. (MCA.Tr-113.) Regarding the other three transcripts, he apparently failed to recognize that they had

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[27] This deposition involved considerable expense since both Vincent's and Peggy's attorneys needed to travel 3 hours each way from Western Mass. up to Franconia NH to depose Dr. Belz.

[28] Note that these 14 paintings that dubiously got recategorized have never been made available for Vincent and Lydia to choose from.

[29] There is no allegation that Dr. Belz acted unethically or incompetently, only that he was unwittingly duped and manipulated.

already been included in the record in their entireties. (A1-58-166.) So judge Wilson's allegation of malfeasance regarding these transcripts is wrong. (MCA.Op.Br-18.)

Judge Wilson's Memorandum also states that Vincent filed a motion for preliminary injunction and that this motion was denied (Ap.A-38) but he fails to state that he initially found the motion meritorious enough that he granted a TRO on account of it on 2/26/03 (Ap.D-74-76) which ran for 16 days (through 3/11/03) and prevented the executrix from selling any paintings during a portion of a show of Greg's work, which ran from about March 4th through 31st.

His procedural history also states that Vincent sought reconsideration of the order denying the motion for preliminary injunction with several emergency and ex parte motions. He then writes that because of these repetitive motions he issued an order on 3/26/03 prohibiting and restraining Vincent from filing any more ex parte or emergency motions of any kind. (Ap.A-38.) However, he fails to explain, first of all, that Vincent filed only *one* ex parte motion and only *one* emergency motion (A1-11). He also fails to explain the context of these motions. The ex parte motion and the emergency motion were both seeking a TRO to prevent Peggy from selling paintings during a show of Greg's work until a motion for reconsideration of the order denying a motion for preliminary injunction could be considered. These two motions essentially sought the continuation of a TRO which judge Wilson had previously issued (pursuant to the motion for preliminary injunction) on 2/26/03 and which had ended on 3/11/03 (during the show). All this was going on during a show of Greg's work and the executrix had indicated that she was intending to sell Greg's painting in violation of the terms of Greg's wishes, without endeavoring to place them in museums. Vincent was greatly worried about this and that is why he filed the *one* ex parte motion and the *one* emergency motion seeking the TRO.

Also, Judge Wilson said that Peggy was doing a good job of following the decedent's wishes and in support of this he

argued that Peggy had arranged to have a show of Greg's work at the Nielsen Gallery coincide with another show of his work at the Fogg Art Museum (both are in Boston), and that she thereby was maximizing the viewing exposure of Greg's work during sales. (Ap.A-59.) This reflects another significant misunderstanding of a key portion of Greg's will. The will does *not* seek to maximize the viewing exposure of the works *during* sales. It seeks to maximize the viewing exposure of the works *after* their sales (as would happen if the paintings were sold to museums). (MCA.Op.Br-45.)[30]

IX) Conclusion:

For all of the above reasons, the petitioner requests that the Supreme Court grant this petition for writ of certiorari.

Date: February 21, 2007 Signed: Vincent Gillespie

Vincent Gillespie
Party in pro per

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[30] In a summary judgment motion the moving party (Peggy) must show that there are no material facts in dispute and that she is entitled to judgment as a matter of law. Only then can such a motion be granted. Hub Associates, Inc. v. Goode, 357 Mass. 449, 451 (1970). Graham v. Quincy Food Serv. Emp. Ass'n & Hosp., Lib., 407 Mass. 601, 603 (1990). A court must not engage in credibility determinations and cannot decide such a motion because, in its view, the non-moving party will be unsuccessful at trial. Attorney General v. Bailey, 386 Mass. 367, 370 (1982). "... all doubt as to the existence of a genuine issue of material fact must be resolved against the party moving for summary judgment." Bailey at 371. Despite these standards which lean heavily towards Vincent, the Probate Court failed to interpret the facts in a light favorable to him. (MCA.Op.Br-18-22.) (This may reflect bias by Judge Wilson.)

Similarly, for a reviewing court, all facts properly presented to the lower courts by the party opposing summary judgment must be assumed to be true and that party must be given the benefit of all favorable inferences that may be drawn from those materials. Graham at 603. Harrison v. Boston Financial Data Services, Inc., 37 Mass. App. Ct. 133, 136 (1994). However, the Mass. Appeals Court failed to do these things.